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No. 98-1636

Supreme Court, U.S.
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In The

Supreme Court of the United States

BLUE CROSS OF CALIFORNIA, CALIFORNIACARE HEALTH PLANS, WELLPOINT HEALTH NETWORKS INC., A California Corporation,

Petitioners,

vs.

CALIFORNIA SUPERIOR COURT; ELIZABETH FARQUHAR and LAURIE WINETT, individually, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court should dismiss this appeal from the denial of an interlocutory writ in a case where there has been no final judgment of any kind.

Whether the Federal Arbitration Act, 9 U.S.C. §1, preempts California law that is not hostile to arbitration, nor hostile to the parties' stated agreement to arbitrate.

Whether the Federal Arbitration Act pre-empts all state laws that are not procedurally identical to it, even where that state law encourages arbitration and supports the parties' agreement to arbitrate.

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JURISDICTION – OBJECTION

This Court lacks jurisdiction to grant Blue Cross's petition. Contrary to Blue Cross's reliance on 28 U.S.C. §1257(a), there has been no "final judgment" in this case. Consequently, Respondents hereby object to the petition based upon this Court's lack of jurisdiction. This petition seeks review of an interlocutory opinion of a California Court of Appeal. That opinion is not reviewable by this Court, because no "final judgment" has been entered in this case as that requirement is set forth in the case of *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997). Respondents submit, therefore, that the subject petition must be dismissed. This objection is briefed in further detail under the section entitled "REASONS FOR DISMISSING OR DENYING THE PETITION."

INTRODUCTION

During the pendency of this (not yet certified) consumer class action against Blue Cross of California *et al.* (collectively "Blue Cross"), an interlocutory writ proceeding was taken up by Petitioner Blue Cross to the California Court of Appeal. A published opinion resulted concerning the parties' skirmish over whether the parties should be permitted to conduct pretrial discovery on the class issues. The California Court of Appeal ruled adversely to Blue Cross, affirming the trial court's denial of Blue Cross's motion to stay the litigation. The court's ruling was based on the grounds that the pretrial discovery on the class issues could proceed, because the court noted that it intended to refer the case to the American

Arbitration Association ("AAA") for a classwide arbitration, if the court ruled favorably on the plaintiffs' motion for class certification. (Petitioners' App. 40)

Blue Cross then filed a petition for review in the California Supreme Court to have the appellate court's opinion reviewed. However, the California Supreme court denied the petition for review, leaving the trial court's order denying the motion to stay the litigation to stand. Consequently, discovery on the class issues was permitted to go forward.

By way of this petition, Blue Cross is challenging the California Court of Appeal's interlocutory opinion, which opinion permits the parties to conduct discovery on the class issues. However, no final judgment has been entered in this case. In fact, the trial court has not even heard the plaintiffs' motion to certify the class and to certify the plaintiffs as the representatives of the class.

OPINIONS BELOW

The California Court of Appeal, Second Appellate District, Division Five issued an opinion concerning the interlocutory writ proceeding on October 6, 1998. The same is reported as *Blue Cross of California v. Superior Court*, 67 Cal.App.4th 42, 78 Cal.Rptr.2d 779 (1998). Blue Cross filed a petition for review in the California Supreme Court. The California Supreme Court denied the petition for review. The denial was entered on January 13, 1999. Following the California Supreme Court's denial of the petition for review, the California Court of Appeal issued a Remittitur through which jurisdiction over the

case was returned to the trial court for further proceedings. The trial court held such jurisdiction, until the subject petition for a writ of certiorari was filed by Blue Cross. The California trial court has not yet conducted a hearing nor entered any orders concerning the Respondents' motion for class certification, which motion seeks an order certifying the class and certifying the plaintiffs as the representatives of that class. Further, no final judgment has been entered in this case.

STATEMENT OF THE CASE

The two named plaintiffs, Elizabeth Farquhar and Laurie Winett, are pursuing this consumer class action against Blue Cross. The named plaintiffs are the Respondents to this petition. The plaintiffs allege in the complaint that Blue Cross has "engaged in a widespread practice of selling and administering health plans which violate laws concerning pre-existing condition exclusions, waiting period exclusions, waivered condition exclusions, and temporary exclusions." Blue Cross answered the complaint alleging, in part, that plaintiffs were required by contract to resolve their claims through binding arbitration.

The arbitration provision is in Blue Cross's standardized health plan contract. In the contract booklets entitled the "Prudent Buyer Plan Service Agreement and Combined Evidence of Coverage and Disclosure Form" it states: "PART VII BINDING ARBITRATION [¶] A. Any dispute or claim, of whatever nature, arising out of, in connection with, or in relation to this Agreement or

breach thereof, or in relation to care or delivery of care, including any claim based on contract, tort or statute, must be resolved by arbitration if the amount sought exceeds the jurisdictional limit of the small claims court [¶] B. Any disputes regarding a claim for damages within the jurisdictional limits of the small claims court will be resolved in such court. [¶] C. The arbitration is begun by the Member making written demand on Blue Cross. The arbitration will be conducted by the American Arbitration Association according to its commercial rules of arbitration. The arbitration shall be held in the state of California. [¶] D. The Member and Blue Cross agree to be bound by the arbitration provision and acknowledge that they are giving up their right to a trial by court or jury. [¶] E. The arbitration findings will be final and binding except to the extent that California or Federal law provide for the judicial review of arbitration proceedings."

Blue Cross filed a petition in the trial court to compel arbitration of the individual plaintiffs' claims and a motion to stay the litigation. Plaintiffs opposed the petition to compel arbitration and the motion to stay the litigation, including all classwide discovery. Plaintiffs argued that the motion to stay the classwide discovery should be denied, because California law is favorable to arbitration and California procedural law concerning the means of conducting the arbitration was not preempted by the act. The trial court granted Blue Cross's petition to compel arbitration and to stay judicial proceedings *as to the individual plaintiffs*, but denied Blue Cross's motion to stay the litigation as a whole. The trial court ordered in part: "The Motion to Stay Judicial Proceedings is denied as to the class claims alleged in the Complaint. Discovery

shall continue as to the class claims for purposes of a possible class certification motion and, . . . if a class is certified, the class claims will be referred to class-wide arbitration . . . ", which is permitted under California law. (Petitioners' App. 40)

Blue Cross then filed an interlocutory petition for a writ of mandate, prohibition or other appropriate relief. Blue Cross contended that the act preempts California arbitration law and preempts California procedural law that permits classwide arbitration. It argued that the trial court had therefore erred in denying the motion to stay the litigation as a whole. Blue Cross supported its request for interlocutory relief on the grounds that if classwide arbitration is not allowed [as a matter of federal law], then the parties would waste judicial resources and be burdened with unnecessary expenditure of time and money. (Petitioners' App. 5) The California Court of Appeal issued an order to show cause why the relief prayed for in the petition should not be granted. The California Court of Appeal identified the issue as whether the act prohibits classwide arbitration in cases where the agreement between the parties is silent on the issue of a classwide arbitration and where the state decisional authority specifically provides for such classwide arbitration. The California Court of Appeal held a trial court did possess the authority to enter an order denying a request to stay class discovery on the grounds that a trial court may, under appropriate circumstances, certify a class and order arbitration on a classwide basis. (Petitioners' App. 34) The California Court of Appeal deferred

any ruling as to whether this case presents the appropriate circumstances for a classwide arbitration as premature. (Petitioners' App. 33)

Additionally, the California Court of Appeal explained: "[¶] Blue Cross also contends that an order compelling classwide arbitration in this case would interfere with the parties' intentions; it asserts it bargained for individual arbitration conducted according to the rules of the American Arbitration Association (AAA), not this 'hybrid' classwide arbitration requiring judicial intervention. ***This argument is premature.*** [emphasis added] The only issue before this court is whether the *Keating* rule is preempted by the act. No order has been entered certifying a class. No order has been entered requiring classwide arbitration. (E.g. *Gainey v. Occidental Land Research* (1986), 186 Cal.App.3d 1051, 1054-1055) Whether classwide arbitration is appropriate in this matter is a question left to the trial court's discretion upon consideration of a variety of factors. (*Keating v. Superior Court, supra,* 31 Cal.3d at p. 613; *Izzi v. Mesquite Country Club, supra,* 186 Cal.App.3d 1309, at pp. 1314, 1322 (1986).) Moreover, under *Keating,* an arbitration agreement that is silent as to classwide arbitration is amenable to such procedure." (Petitioners' App. 33)

REASONS FOR DISMISSING OR DENYING THIS PETITION

This court should deny this petition on the grounds there is no jurisdiction. This court may not review the interlocutory opinion issued by the California Court of

Appeal in this case, because this case has not yet proceeded to a "final judgment" as that term is used in 28 U.S.C. §1257(a). *Jefferson v. City of Tarrant, Alabama,* 522 U.S. 75 (1997). Additionally, the petition should be denied because it does not raise issues that warrant review by this court.

Significantly, Blue Cross has made a factually misleading statement in the subject petition. (Rule 15.6) Blue Cross asserts that "[the AAA's commercial rules] do not provide for classwide arbitration . . . " (petition, p. 10) However, Blue Cross is glossing over the fact that the California Court of Appeal found Blue Cross failed to make a sufficient showing to support such a finding. The California Court of Appeal found: "[f]urther, there has been no showing that an order compelling classwide arbitration would conflict with the agreement to proceed under AAA rules." (Petitioners' App. 33)

This case is not yet far enough along in the proceedings to provide a complete evidentiary record to address the *Keating* issue. This case has not yet proceeded to a hearing and ruling in the trial court, or any court, concerning plaintiffs' motion to have the class certified. Because the trial court has not made factual findings concerning the certification of the class, this petition may be rendered moot when this case is permitted to go forward in the lower courts. Therefore, even if there were a "final judgment" in this case (which there is not), this case is not a good vehicle for addressing the concerns raised by Blue Cross.

Finally, the decision of the California Court of Appeal does not conflict with the act, or even conflict with the federal authorities relied upon by Blue Cross.

I. THERE IS NO JURISDICTION

This Court lacks jurisdiction to grant Blue Cross's petition. Contrary to Blue Cross's reliance on 28 U.S.C. §1257(a), there has been no "final judgment" in this case. Consequently, Respondents hereby object to the petition based upon this Court's lack of jurisdiction. This petition focuses on an interlocutory opinion of a California Court of Appeal. That opinion is not reviewable by this Court, because there has been no "final judgment" in this case as that requirement is set forth in the case of *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997). Respondents submit, therefore, that this subject petition must be dismissed.

The text of 28 U.S.C. §1257(a) is set forth in the Petitioners' Appendix at pages "App. 47-48." This Court has held that: "this provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S.Ct. 770, 773, 89 L.Ed. 1171 (1945). As [this Court] has recognized, the finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal

system.' *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 509 (1945)." *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S.Ct. 481, 485-486 (1997).

As applied here, the California Court of Appeal's opinion has not resulted in a "final judgment." It is an avowedly interlocutory affirmance of a trial court's interlocutory order permitting the parties to conduct pretrial discovery. It is an interlocutory affirmance that the plaintiffs have a right to gather evidence in support of their complaint's allegations regarding the presence of the traditional elements of a class action case, such as numerosity, commonality, typicality, adequacy of representation, and so on. (Petitioners' App. 40) In fact, the plaintiffs' motion to certify the class has not yet even been heard or ruled upon by the trial court, much less the final court of the state.

Moreover, this is not a case that comes within the limited set of situations in which there is finality as to the federal issue despite the ordering of further proceedings in the lower state courts. This is not a case in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480, 95 S.Ct. 1029, 1038, 43 L.Ed.2d 328 (1975). Rather, the resolution of the state-law claims could effectively moot the federal-law question raised here. Most notably, the motion for class certification could be denied or Blue Cross could voluntarily relinquish its right to object to class certification in the future in the state court proceedings. And, the same issues, such as whether the act preempts California law,

may be revisited in a subsequent appeal. The interlocutory decision may be subject to a further review or correction by the California Supreme Court. This case presents "the typical situation in which the state courts have resolved some but not all of the Petitioners' claims." *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 118 S.Ct. 481, 486 (1997). Because the California Supreme Court has not yet rendered a final judgment, this Court lacks jurisdiction to review the decision on the pretrial discovery issue.

II. THE DECISION OF THE CALIFORNIA COURT OF APPEAL DOES NOT CONFLICT WITH THE ACT OR EVEN CONFLICT WITH THE FEDERAL AUTHORITIES RELIED UPON BY BLUE CROSS

The facts of this case simply do not show that there is a conflict between federal law and state law. Contrary to the protestations of Blue Cross, the California courts have not run afoul of the act's requirement that an arbitration clause must be placed on equal footing with the other terms of the contract. The California courts in this case have simply enforced the bargain struck between the parties concerning the right to arbitrate. Factually, this contract was silent concerning a classwide arbitration. (Petitioners' App. 34) The California trial court thus found that the parties did not bargain away the right to file a class action. (Petitioners' App. 41) The California Appellate Court held that where the agreement is silent on the classwide arbitration issue, the trial court may order a classwide arbitration because state decisional authority specifically provides for such arbitration. (Petitioners' App. 34)

Federal law does not prohibit or restrict "classwide arbitration" to anything like the extent suggested by Blue Cross. Under federal law, as articulated in *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995), and the cases on which the Seventh Circuit relied, there was no preexisting authority for a classwide arbitration in that particular jurisdiction of the Seventh Circuit. Under those circumstances, the *Champ* court refused to read such authority into the parties' arbitration agreement. Here, on the other hand, the state law of California authorizes classwide arbitration in California. *Keating v. Superior Court*, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal.Rptr. 360 (1982), *rev'd in part and appeal dismissed in part sub nom., Southland Corp. v. Keating*, 465 U.S. 1 (1984). Blue Cross does not and cannot contend that the act categorically prohibits classwide arbitration, thus there is simply no basis upon which to invoke the very limited pre-emption provided in the act.

It is simply not true that unless the contract in this case expressly defines "any disputes" to *include* a "classwide dispute," the class procedures and the right to a classwide arbitration are precluded by the contract or the act. Blue Cross drafted the contract and did not exclude classwide disputes from "any disputes." Thus, the California court ruled correctly, and Blue Cross is disappointed by the result. The construction of the terms of an arbitration agreement, for purposes of applying the act, may be made under an evenhanded application of the state's common law of contract, and by the application of the state's procedures for implementing the arbitration agreement. *Volt Inf. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 478-479 (1989). This Court allows parties in

arbitration agreements to choose to apply state law. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, fn. 4 (1995). That is all that happened here. Blue Cross drafted the agreement, and chose California law as controlling. That law favors arbitration, thus precluding pre-emption, and permits the arbitration to take a form that the parties did not preclude. Where Blue Cross is getting exactly what it bargained for, arbitration under California law, it has no reason to be before this or any other court.

As applied in this case, the California court correctly construed the terms of the contract to permit a classwide arbitration under California's procedural rules. If the case were in a federal forum, the result may have been the same despite the application of the rules of federal civil procedure. There is no reason to conclude a federal court applying the federal procedural rules would necessarily reach a different result than a state court reached under the application of California's procedural rules. Most significantly, the trial court noted that the court's ruling was consistent with what the result would have been, assuming the federal procedures required a strict construction of the arbitration agreement. In other words, the court found federal law would also permit a classwide arbitration in this case. (Petitioners' App. 41-42) Simply put, there is no conflict between federal law and state law in this case. Federal law encourages the arbitration the parties agreed to, and California law does likewise. There is no conflict.

The California trial court held: "7. The federal authorities cited hold that the FAA was designed to counter judicial reluctance against enforcing arbitration clauses, and to place arbitration agreements 'on the same

footing' as other contracts. Assuming strict construction is the appropriate approach, it appears to this Court that strict construction requires that it enforce the contract as written, but take away no more than was bargained for. That is how the Court would construe any other contract provision and is what California has historically done with arbitration agreements. *See, Izz[i], supra.*" (Petitioners' App. 42)

Significantly, this Court has previously held that the act does not prevent the enforcement of agreements to arbitrate under state procedural law. *Volt Inf. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 478-479 (1989). Blue Cross does not dispute that the federal act permits classwide arbitration of disputes involving a private agreement to arbitrate in appropriate cases. Blue Cross does not contend that the act categorically prohibits classwide arbitrations.

"There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforcability, according to their terms, of private agreements to arbitrate." *Volt Inf. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, at p. 476. Moreover, "[the act] itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, by giving courts authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory judgments. [Citation.]" *Volt Inf. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, at p. 476, fn. 5.

Until that authority is overturned, the parties may be presumed to have intended that the legal rights existing

at the time the parties entered the agreement would be enforceable as part of the implied terms of the contract.

In this case both the act and the California decisional authority permit a trial court to require a classwide arbitration where the parties have agreed to an arbitration of "any dispute." Blue Cross has not shown there is a conflict between federal and state law which warrants review by this Court.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request this Court to dismiss or deny the petition.

Respectfully submitted,

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